No. 80-328

In The

Supreme Court of the United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF NEW YORK,

v.

ROGER BELTON,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of New York

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

May a police officer search, as incident to a lawful arrest, a jacket found inside an automobile while the automobile's four occupants, all under arrest, are standing unsecured around the vehicle?

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The judgment and opinion of the New York Court of Appeals (J.A. 75-84) is reported at 50 N.Y.2d 447. The judgment and opinion of the New York Supreme Court, Appellate Division, Fourth Department (J.A. 69-73) is reported at 68 App. Div. 2d 198.

JURISDICTION

The judgment of the New York Court of Appeals (J.A. 75) was entered on June 5, 1980. The petition for a writ of certiorari was filed on September 2, 1980 and was granted on January 19, 1981. The jurisdiction of this Court rests upon Title 28, United States Code, Section 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

This is a criminal prosecution of the respondent for his unlawful possession of a quantity of cocaine in Ontario County, New York on April 9, 1978. The denial of the respondent's motion to suppress the evidence in this case was ultimately reversed by the New York Court of Appeals, which held that the search of the respondent's jacket, from which the contraband was seized, was not incident to his arrest.

The respondent was a passenger with three male companions in an automobile being driven along the New York State Thruway on April 9, 1978, when their car was stopped at approximately 9:00 o'clock A.M. by New York State Trooper Douglas Nicot for a speeding infraction. Upon approaching the vehicle stopped along the shoulder of this interstate highway, the Trooper asked its driver for his license and registration. The operator of the vehicle rolled down his window, at which time Trooper Nicot smelled the odor of burning marijuana emanating from within the car through the window (J.A. 14, 17). The Trooper was provided the car's registration, from which he determined that the car belonged to a Buffalo, New York woman who was not present in the vehicle. The driver also produced a valid license which was subsequently determined as not his own. It was at this time that the Trooper noticed, on the front floorboard, a small manila envelope, stamped "Supergold," which he

recognized from his experience as a container for marijuana (J.A. 19-20, 36).

The four occupants of the car were ordered out, the driver from his side and the three others from the passengers side.[1] Trooper Nicot patted down the occupants of the car in the order from which they alighted, after which all were standing in close proximity to and around the car (J.A. 19). He also advised the car's driver at this time that the latter was to be issued a summons for speeding. Trooper Nicot then returned to the automobile and examined the envelope he had previously observed, finding it to contain traces of marijuana (J.A. 20). He also observed and recovered five or six partially smoked marijuana cigarettes, or "roaches," in the car's ashtrays (J.A. 22, 40).

Trooper Nicot placed the four individuals under arrest for possession of marijuana, either immediately prior or subsequent to the discovery of the substance in the car (J.A. 18, 39). Having only one set of handcuffs, the Trooper did not place them on any of the four arrestees (J.A. 55, 56). They were advised of their constitutional rights and searched, after which Trooper Nicot searched the interior of the automobile in which they had been riding (J.A. 21). In the course of his search, the Trooper came across five jackets lying in the middle of the back seat. Neither the jackets nor the vehicle's interior had been reduced to the exclusive control of Trooper Nicot at this time. One of the jackets was black leather, with several pockets. In searching that jacket, Trooper Nicot found a twenty dollar bill containing a white powder in one of the pockets, which he suspected to be cocaine (J.A. 21, 24). In another zippered pocket was a plastic bag containing a larger amount of white powder. In a third pocket was found a health insurance card in the name of the respondent (J.A. 22). All four arrestees denied ownership of the jacket, and

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[1]The respondent had been seated in the rear seat, on the driver's side (J.A. 18).

all were placed under arrest for criminal possession of a controlled substance.[2]

The Ontario County Grand Jury returned an indictment against the respondent for criminal possession of a controlled substance in the fifth degree, while directing that no charges be filed against his three companions. Subsequent to his arraignment on the charge, the respondent challenged the search of the car and his jacket at a suppression hearing, his contention being that the search was justified by none of the exceptions to the Fourth Amendment's warrant requirement. However, the Ontario County Court (Hon. George A. Reed, presiding) ruled that exigent circumstances did in fact exist, given the nature of the object searched and the fact that Trooper Nicot, alone, was confronted by four arrestees in a rural area. The suppression motion was, therefore, denied (J.A. 65-66).

The respondent later entered a plea of guilty to the reduced charge of attempted criminal possession of a controlled substance in the sixth degree. Because he had previously been convicted of a felony, the appellant was sentenced to an indeterminate term of one and one-half to three years' imprisonment as a second-felony offender. However, the execution of this sentence was stayed pending the respondent's appeal.

The appeal was taken as of right to the New York State Supreme Court, Appellate Division, Fourth Department, where the respondent's conviction was unanimously affirmed. In its opinion, the Court agreed with our contention that the search was justified as a search incident to arrest, in that the search of the "immediate area" was "reasonable in scope, intensity and duration." Further, permissive appeal to the New York Court of Appeals was granted, and that court, by a divided vote, subsequently reversed the respondent's conviction and dismissed the

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[2]The white powder was subsequently determined through laboratory analysis to in fact contain cocaine.

indictment. In its opinion, the Court of Appeals held that once the respondent had been placed under arrest, his jacket was within the exclusive custody and control of the Trooper, and it could not therefore be searched without a warrant.

SUMMARY OF ARGUMENT

A. In *Chimel v. California*, 395 U.S. 752 (1969), this Court held that once an arrest is made, the arresting officer may thereupon search the person of the arrestee and the area " 'within his immediate control' — construing that phrase to mean the area from within which (the arrestee) might gain possession of a weapon or destructible evidence." *Id.* at 763. The purposes of this rule are twofold: to minimize the potential danger to the arresting officer and others, and to minimize the likelihood that evidence may be concealed or destroyed.

Bearing in mind the language and objectives of *Chimel*, the actions taken by Trooper Nicot in the instant case, in searching a jacket in the automobile in which the four arrestees were riding, is constitutionally unobjectionable as a search incident to a lawful arrest. Considering the facts that this sole officer was confronted by four men, all arrested but standing unsecured in any manner around their car, the conclusion is obvious that any or all of the four arrestees could reach anything located in the confines of their car if they so desired. Thus, the right to search this "grabbable area" was triggered.

The instant case is readily distinguished from *United States v. Chadwick*, 433 U.S. 1 (1977), in which the search of a 200-pound footlocker, one and one-half hours after its possessors' arrest and detention, was suppressed. Unlike that case, the search at bar was contemporaneous "in time and place" with the arrest, *id.* at 15; therefore, it was incident to the arrest.

The New York Court of Appeals erroneously concluded in this case that, by telling the four occupants of the automobile that

they were under arrest and by stationing them outside the car, Trooper Nicot had effectively reduced that car and everything in it to his exclusive control. Such a grotesquely restricted interpretation of the search incident to arrest doctrine not only flies in the face of the plain language of *Chimel* and numerous decisions of other courts, but also forces an arresting officer to forego what should be an entirely legitimate search at the risk of serious injury or death.

In order to provide guidance to courts faced with determining the propriety of searches incident to arrest in the future, factors relevant to an appropriate determination should be more clearly delineated. Such considerations include the number of arrestees as opposed to the number of arresting officers; the degree of restraint, if any, imposed on the arrestees; the relative locations of the arrestees and the police vis-a-vis the item searched; and the ease or difficulty inherent in gaining potential access to the item searched. When the instant case is assessed in light of these criteria, the conclusion becomes inescapable that the search was properly conducted.

B. The recent case of *Arkansas v. Sanders*, 442 U.S. 753 (1979) does not compel a different conclusion. While striking down the search of a suitcase taken by police from the trunk of a taxicab, this Court in *Sanders* did not have the occasion to consider the application of the search incident to arrest doctrine to the search and seizure therein. Beyond that, however, it was quite apparent in the opinion that even articles normally deserving of an expectation of privacy may be searched without a warrant where the exigencies of the situation justify such a search. In the case at bar, such exigencies certainly existed in the fact that Trooper Nicot, unlike the police in *Sanders*, had not reduced the property searched to his exclusive control at the time of the search. Thus, the subject search in this case, consistent with the language in *Arkansas v. Sanders*, comported with the strictures contained in the Fourth Amendment. The judgment of the New York Court of Appeals should therefore be reversed.

ARGUMENT

I

The search of the respondent's jacket was properly conducted as a search incident to the respondent's lawful arrest.

A. *The search of the respondent's jacket falls squarely under the doctrine of search incident to arrest as explained in Chimel v. California.*

It has been the contention of the Petitioner in this case, from the initial suppression hearing through every stage of appellate review, that the search conducted by New York State Trooper Nicot of the respondent's jacket was permissible as incidental to the latter's lawful arrest, and therefore not governed by the warrant requirement of the Fourth Amendment.[3] An evaluation of that assertion must begin with reference to this Court's seminal decision in *Chimel v. California*, 395 U.S. 752 (1969), wherein the scope of searches incident to arrest first recognized as lawful in *Weeks v. United States*, 232 U.S. 383 (1914), was explained.

In *Chimel*, the analysis of the doctrine was described thusly:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee *might reach in order to grab a weapon or evidentiary items* must, of course, be governed by a like rule. . . . There is ample justification, therefore, for a search of the arrestee's person and the area *'within his immediate control' — construing that phrase to mean the area from within which he might gain*

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[3]The respondent has conceded at every stage of this proceeding that both the initial stop for speeding and the subsequent arrest for possession of marijuana were lawful.

possession of a weapon or destructible evidence." 395 U.S. at 762, 763 (emphasis added).

Clearly, in the instant case, the search of the respondent's jacket was not a search of his person. The jacket was in a pile with four other jackets in the back seat of the automobile. The four occupants were placed under arrest but not secured in any manner. All were standing immediately alongside the vehicle as Trooper Nicot searched the jacket. The analysis of this case thus may be further refined to the issue of whether the search by the Trooper was of an area from which the four arrestees "might reach in order to grab a weapon or evidentiary items." *Id.*, at 763. Parenthetically, it hardly needs comment that, although the cocaine was discovered in the respondent's jacket, the relevant inquiry is whether, at the time of the search, *any or all* of the four arrestees had potential access to the jackets in the vehicle.

Although the guidance provided in *Chimel* is instructive in determining the issue at bar, factually the two cases are dissimilar. In *Chimel*, three police officers searched the entire house of the defendant, from attic to garage, after placing him under arrest, asserting that the authority for the search was the arrest itself. In the present case, however, significant distinctions exist. For example, rather than outnumbering the arrestee as did the three policemen in *Chimel*, here there was only one police officer with four arrested subjects, and the arrest took place on a busy interstate highway. Furthermore, the officer lacked the capability to secure or restrain his arrestees, having only one set of handcuffs. Beyond that, the search occurred not in a dwelling, but in an automobile, and "one's expectation of privacy in an automobile . . . (is) significantly different from the traditional expectation of privacy and freedom in one's residence." *Rakas v. Illinois*, 439 U.S. 128, 148 (1978; fn. 15); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). And finally, the search of the vehicle and the jacket inside it occurred immediately after the arrest of the four for possession of

marijuana, and while the four were in close proximity to Trooper Nicot and the car.

The latter factors just noted rise to critical importance when considered in the context of another of this Court's major pronouncements relating to the search incident doctrine, *United States v. Chadwick*, 433 U.S. 1 (1977). In *Chadwick*, federal agents, acting on probable cause to believe that a double-locked, 200-pound footlocker contained contraband, arrested its two possessors, separated them from the footlocker, transported the arrestees and the footlocker to the federal building, and conducted a warrantless search of the locker one and one-half hours after the arrests. The federal agents admitted that the locker was under their exclusive control at the time of the search. Ruling that the defendants were entitled to the protection of the Fourth Amendment once the officers assumed exclusive control of the footlocker, the Court suppressed the evidence derived from the search. The decision appears quite clearly to have turned on the fact that the search of the footlocker occurred some 90 minutes after the federal agents had gained exclusive control of the same and long after the defendants were securely in custody. Reiterating prior decisional law, it was stated that:

> "(W)arrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time and place from the arrest,' *Preston v. United States*, 376 U.S. at 367, . . . or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." 433 U.S. at 15.

Thus, *Chadwick* stands for the proposition that a search cannot be sustained as incidental to an arrest if the property

being searched has been reduced to the exclusive control of the police. However, *Chadwick* does not prohibit a search as incident to arrest where the property in question has not come under the exclusive control of the police. This is clearly the factual situation presented in the instant case, with the jackets lying in the open vehicle's back seat. Furthermore, rather than being "remote in time or place" to the arrest, the search of the jackets was contemporaneous and coterminous with the arrest of the four individuals. *Chadwick's* holding is extremely instructive when applied to the facts of this case, and provides persuasive support for our position. Unlike the 200-pound footlocker in that case, the Trooper herein seized a portable, black leather jacket. Furthermore, unlike the 90-minute delay between arrest and search in *Chadwick*, Trooper Nicot executed his search *immediately* after the arrest. And, perhaps most importantly, Trooper Nicot was faced with the uncertainties posed by four unrestrained arrestees all in close proximity to him at the time of the search, a far cry from the situation faced by the federal agents in *Chadwick*, who had already placed the two defendants there in secure custody at the time of their search. Perhaps the dissent in the instant case in the New York Court of Appeals described the situation best when it was characterized at the time of the search as "still fluid." *People v. Belton*, 50 N.Y.2d 447 (1980; Gabrielli, J., dissenting). The Trooper could not readily secure the vehicle with all of its contents, parked on an interstate highway, and still transport his four arrestees to secure detention. Trooper Nicot would certainly have been negligent to have let his prisoners remove their possessions from the vehicle without first searching those possessions for weapons or additional contraband. Interpreting the search by Trooper Nicot in the case at bar as violative of the Fourth Amendment would certainly add irretrievably to making the criminal law "a trap for the unwary policeman and distract from the important activities of detecting criminal activity and protecting the public

safety." *United States v. Chadwick, supra,* at 24 (Blackmun, J., dissenting).

This Court has repeatedly emphasized that whether a search can be sustained as incidental to a lawful arrest depends upon the factual situation in which the police and their arrestees find themselves. For example, in *Preston v. United States,* 376 U.S. 364 (1964), cited with approval in *Chadwick,* a search of the automobile in which three persons who were arrested for vagrancy had been situated was invalidated where the search occurred after the police drove the vehicle to their station and then had it towed to a garage, after the arrestees were confined in the police station. In holding the search not incidental to the arrest, this Court's opinion centered on the fact that the search was "remote in time or place from the arrest." 376 U.S. at 367.

Again, in *Dyke v. Taylor Implement Co.,* 391 U.S. 216 (1967), this Court struck down a search, purportedly incidental to a lawful arrest, where the car being driven by an arrestee was searched while it was parked outside the jail in which the arrestee was already incarcerated. Citing *Preston's* holding that a search conducted "remote in time or place" from an arrest is not an incident of the arrest, the fruits of the search conducted in *Dyke* were suppressed.

Unlike the factual patterns presented in *Preston* and *Dyke,* or even in *Chadwick,* the search conducted by Trooper Nicot clearly was neither remote in time nor place from the arrest. The vehicle and its contents cannot be considered to have been reduced to the exclusive control of the Trooper. The occupants of the vehicle, while under arrest, were not secured; they were all standing around the car, and the jackets in the back seat were certainly within their immediate area. As compared with the clear lack of access to the seized items by the arrestees in *Chadwick, Preston* or *Dyke,* the arrestees in the instant case certainly had potential access to the property in question, i.e., the jacket on the back seat.

The facts adduced at the suppression hearing show that Trooper Nicot stationed all four arrestees around their car as he frisked them following the initial detainment. As he testified, the four were "all in close proximity . . . around the car" (J.A. 19). Thereafter, following his discovery of the marijuana in the car, the four were brought together to be read their Miranda rights, but were not secured in any fashion. Indeed, Trooper Nicot only had the capacity to restrain one of the four, insofar as he only possessed one set of handcuffs. No other police officers were at the scene.

To assert that the contents of the automobile, including the respondent's jacket, were reduced to the exclusive custody of the Trooper merely because all four arrestees were standing outside the car and had been advised they were under arrest borders on the ludicrous. It would certainly have been a simple matter for the four to overpower the officer, who had not drawn his service revolver, or to rush him to grab whatever they desired from the recesses of the car. Under the facts of this case, any of the arrestees, either acting alone or in concert, could easily have reached into the car to grab a weapon or, for that matter, to grab the cocaine and scatter it to the wind, thus destroying the only tangible evidence of the crime then existing in the car.[4]

At the time Trooper Nicot began his search of the car, there was no overt indication that any weapons were secreted in the car, although it was certainly plausible that contraband in the form of drugs was located therein. However, Trooper Nicot

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[4]Entirely apart from the above, one must consider whether the constitutionality of the instant search should really even turn on the chance circumstance that, at the time of the stop, the respondent's jacket was beside him on the back seat rather than worn. Had the jacket been worn by the respondent at the time of a search, there is no question but that a search of its pockets would have been permissible under *United States v. Robinson*, 414 U.S. 218 (1973), discussed *infra*. Should the mere happenstance that the respondent may have removed the jacket moments earlier and set it beside him alter the constitutional picture so markedly?

having had a lawful basis to search the car (as incident to arrest), the question of the likelihood of illicit substances being found therein became irrelevant. "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *United States v. Robinson*, 414 U.S. 218, 235 (1973). While the issue in *Robinson* was confined to a search of the defendant's person, under the reasoning of *Chimel* and *Chadwick* the same conclusion must, *a fortiori*, obtain concerning searches of the "grabbable area" of an arrestee. "Such searches may be conducted without a warrant, and they may also be made whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence. The potential dangers lurking in all custodial arrests make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved. *United States v. Chadwick, supra*, at 14, 15. Thus, the same concerns espoused by this Court in *Robinson* in approving searches of the person incident to arrest, (i.e., "the need to disarm and to discover evidence," ibid.) are also the same concerns espoused by this Court in *Chimel* and *Chadwick, supra*.[5]

The same conclusion obtains with even greater force when the particular area to be searched incident to arrest involves a

[5]This point also effectively negates respondent's contention, advanced in his brief in opposition to the petition for writ of certiorari in this case, that since there was no finding made that Trooper Nicot was in danger, we are now precluded from relying on the possibility of danger to the officer as a circumstance justifying the search.

vehicle and its contents. This Court has specifically refused to draw the conclusion that persons arrested for traffic offenses are less likely to possess dangerous weapons than are those arrested for other crimes. See *United States v. Robinson, supra,* at 234. "It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting Terry-type stop." *Id.,* at 234, 235. There is certainly a wealth of statistical information available which supports this conclusion. Unfortunately, to the statistics cited in footnote four to the majority's opinion in *Robinson* may be added the growing number of assaults on police officers during traffic stops. The latest figure in a series of yearly increases shows that 6,329 officers were assaulted in 1979 during the course of traffic stops of vehicles. This figure represents an increase of over one thousand such assaults in just three years. Beyond that, 82 police officers were murdered during the course of routine traffic stops during the five-year period between 1975 and 1979.[6]

While, with the exception of *Arkansas v. Sanders,* 442 U.S. 753 (1979), discussed *infra,* this Court has not heretofore written on the subject of a warrantless search of effects taken from an automobile lawfully stopped (as opposed to a search of some integral part of the automobile itself; see *Arkansas v. Sanders, supra,* at 763) numerous federal courts and state courts of last resort have had the opportunity to apply this Court's decisions to cases posing similar questions as that at bar. The resulting decisions of these courts have quite consistently produced thoughtful and articulate interpretations of the search incident to arrest doctrine in a manner consonant with our position concerning the legality of the present search.

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[6]Source: *Crime in the United States,* 1975-1979, Uniform Crime Reports of the United States Department of Justice; *Law Enforcement Officers Killed,* 1975-1980, Uniform Crime Reports of the United States Department of Justice.

A brief review of some of these cases is illustrative in demonstrating the types of considerations properly employed by the courts in determining whether a particular search was incidental to an arrest. Where the situation is still "fluid," and the area or items searched have not been reduced to the exclusive control of the police, as was the situation in the present case, courts have sustained searches of automobiles and their contents as properly incidental to the arrest. Examples of these decisions include *United States v. Fontecha*, 576 F.2d 601 (5th Cir., 1978; sustaining search of unlocked suitcase in back seat of car by one officer confronted by two arrestees, one still in car at time of search); *United States v. Foster*, 584 F.2d 997 (D.C. Cir., 1978; sustaining search of grocery bag between two front seats while four arrestees were located in and about car); *United States v. Wilkerson*, 598 F.2d 621 (D.C. Cir., 1978; sustaining search of coat on front seat of car by one of five officers as defendants stood outside car and one remained inside); *North Carolina v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980; sustaining search of front seat area of car while defendant standing outside open door with hands on car's roof); *Banks v. Georgia*, 246 Ga. 178, 269 S.E. 2d 450 (1980; sustaining search of shirt on car's floor while defendant leaning against car while car door open); *Louisiana v. Wilkins*, 364 So. 2d 934 (1978; sustaining search of floor of taxicab while arrestee standing by car's open door with hands on roof). Other cases upholding searches under circumstances similar to those noted above include *United States v. Agostino*, 608 F.2d 1035 (5th Cir., 1979); *United States v. Ajlouny*, 476 F. Supp. 995 (E.D.N.Y., 1979); *United States v. Ocampo*, 492 F. Supp. 1211 (E.D.N.Y., 1980).

In *United States v. Fontecha, supra*, the Fifth Circuit Court of Appeals prudently observed that:

> "At the time that (the police officer) stopped Fontecha's car, he had no way of knowing what dangers, if any, he faced or what plans the two occupants of the car might have had for disposing of evidence (footnote omitted). This

> two-on-one confrontation involving an automobile on a deserted road furnished sufficient exigent circumstances — judged as of that time and not in light of subsequent events — to justify an immediate search . . . ." 576 F.2d at 605.

Similarly, in *United States v. Wilkerson, supra,* the Court of Appeals recognized precisely the point we are advancing in this brief, when it noted:

> "It takes little imagination to realize that an armed suspect might hide his weapon in a car before getting out in response to a police order. Thereafter standing next to the car without handcuffs, either the driver or one of the passengers could have bolted to it, seized a weapon and fired before the officers could find cover." 598 F.2d at 625.

By the same token, it takes little imagination to realize that a suspect might well also secrete illicit, readily destructible drugs in a car before exiting it in response to a police order. The basic issue thus returns to an assessment as to whether the contents of the automobile had been reduced to the complete and exclusive control of the arresting officer, or whether the contents could still be retrieved by one or more of the arrestees if they rushed into the car.

In a number of other cases, courts have invalidated searches of a car's interior or contents, but in each such case a critical element relating to the custody of the items searched was different. For example, searches of effects in a car, even if the arrestees are nearby, have usually been struck down if, among other factors, the arrestees have been handcuffed, thereby reducing the property to the exclusive control of the police. See, e.g., *United States v. Neumann,* 585 F.2d 355 (8th Cir., 1978); *United States v. Schleis,* 582 F.2d 1166 (8th Cir., 1978); *New Jersey v. Welsh,* 84 N.J. 346, 419 A.2d 1123 (1980). Still other cases have invalidated searches purportedly incidental to arrest when the item searched has been reduced to the exclusive control of the police due to the fact that the arrestees have been im-

mobilized by a greater number of police. See, e.g., *Rhode Island v. Robalewski*, 418 A.2d 817 (1980); *Montana v. Cripps*, 582 P.2d 312 (1978); *Louisiana v. Blanchard*, 374 So. 2d 1248 (1979). A number of other decisions have ruled invalid searches conducted so far removed in time or space from the arrest as to be clearly not incidental to the arrest.

Each of the cases cited above involved the sifting together of a variety of factors all relevant under the application of the search incident to arrest doctrine. We feel confident in asserting that any of these courts, utilizing the same analytical considerations espoused in their own decisions, would have sustained the search conducted in the instant case if presented with its factual pattern. The fact that the New York Court of Appeals has decided contrarily is an anomaly, an aberration in an otherwise generally consistent approach by the various courts in the nation. It is this anomaly that must be corrected by this Court.

In the respondent's brief in opposition to the petition for a writ of certiorari in this case, it is argued that we are asking this Court to arrive at an inflexible formula whose variables would include the number of defendants, the number of police officers, and the number of sets of handcuffs. We are asking this Court to do no such thing. We *are* submitting, however, that under the standards enunciated in *Chimel v. California, supra*, and its progeny, each case must be examined with an eye toward its own particular facts, and among those facts are the number of participants and the degree of restraint, if any, imposed upon the arrestees. This same conclusion was articulately explained by the Supreme Court of New Jersey in *New Jersey v. Welsh, supra:*

> "The relevant facts, then, appear to be those which disclose what places the person under arrest presently could reach at the time the arrest is undertaken and how likely it is that he would attempt resistance or escape or destruction of evidence. Important considerations are

> whether the arrestee has been placed under some form of restraint, the positions of defendant and the arresting officer in relation to the vehicle, the difficulties to be encountered in gaining access to the vehicle as to the particular area therein searched, and the number of officers present as compared with the number of persons arrested or bystanders in the immediate vicinity." 419 A. 2d at 1127.

Similarly, Professor LaFave, in his recent treatise on search and seizure law, listed the criteria generally employed by the nation's courts in following this Court's decision in *Chimel* and its "immediate control" test as it relates to vehicles. The relevant considerations cited by LaFave include (1) whether the arrestee was placed in some form of restraints; (2) the location of the arrestee vis-a-vis the automobile; (3) the ease or difficulty of the arrestee's gaining entry to the vehicle's interior; and (4) the number of officers present in relation to the number of arrestees. 2W. LaFave, *Search and Seizure*, §7.1 (b) (1978).

While this common-sense approach has been implicit throughout this Court's pronouncements on searches incident to arrest in the past, a clear statement from this Court to the effect that these are the types of factors courts must consider when assessing the propriety of searches incident to arrest might well serve to prevent, or at least minimize, the occasion of erroneous interpretations of the law such as was rendered by the New York Court of Appeals in this case.

Beyond that, however, the New York Court of Appeals' opinion also distorts the clear meaning of the concept of "immediate" or "exclusive" control, the point beyond which a search conducted following an arrest is no longer incident to it. Analyzing the opinion of the Court of Appeals on its face, it becomes evident that, as Judge Gabrielli noted in dissent, the majority considers that "since the suspects were standing outside the car at the time of the search and had been told that they were under arrest, both their persons and their property

had thereby been conclusively and safely reduced to the complete control of the officer, as a matter of law." *People v. Belton, supra,* at 454, 455. Such a patently erroneous interpretation of the basic doctrine of *Chimel v. California* should be clearly repudiated.

Even a brief review of the circumstances facing the Trooper in this case at the time he arrested his four subjects makes it amply clear that he acted in an entirely appropriate fashion. Obviously, all four arrestees had not been secured or immobilized, nor did Trooper Nicot posses the capacity at that time and place to do so. There were no other officers at the scene. The Trooper had the right, and we submit, the duty as well, to make certain that his safety was not threatened by the four men in his presence, and that any evidence secreted in the car was not destroyed. To hold to anything less under the facts of this case will have the effect of requiring police officers such as Trooper Nicot to choose between insuring that concerns of personal safety and preservation of evidence are met, or risking the suppression of tangible, probative evidence such as that recovered in the instant case. "Surely, the Constitution does not require police officers to make the unhappy choice between dereliction of duty and risk of death . . . (T)he Fourth Amendment's proscription against unreasonable searches and seizures (does not) require officers . . . to risk their lives needlessly in the performance of their duty." *New York v. Earl,* 431 U.S. 943 (1977; Burger, C.J., dissenting from cert. den.).

As noted earlier, the majority opinion in the New York Court of Appeals seems to indicate that once a person is told he is arrested and steps out of his automobile, everything inside that vehicle has thereby been conclusively reduced to the exclusive control of the arresting officer. As Judge Gabrielli noted in his dissent from that conclusion, "one might well wish that all criminal suspects could so readily be subdued as a matter of law, (but) I cannot agree with a decision that requires a police officer

to stake his very life upon the validity of such a questionable presumption." *New York v. Belton, supra,* at 455 (Gabrielli, J., dissenting).

In short, this is not a case such as those previously presented to this Court in *Preston, Dyke, Chimel* or *Chadwick, supra.* In each of those cases and others like them there was no possible way that the particular arrestee involved could gain access to the particular area searched. As such, the facts in the instant case are markedly different. We believe a considered approach to this case must result in the clear and inescapable conclusion that the subject property had simply not been reduced to the Trooper's exclusive control. Any or all of the four arrestees could have gained access to the jacket if they had chosen to do so. Accordingly, Trooper Nicot's actions in searching the jacket should be sustained, the fruits of the search should be declared admissible, and the respondent's conviction should be reinstated.

B. *The Decision of Arkansas v. Sanders Does Not Affect the Validity of the Instant Search*

In the recent decision of *Arkansas v. Sanders,* 442 U.S. 753 (1979), this Court reiterated its pronouncement, in the context of the warrant clause of the Fourth Amendment, that "a few 'jealously and carefully drawn' (footnote omitted) exceptions provide for those cases where the societal costs of obtaining a warrant, *such as danger to law officers or the risk of loss or destruction of evidence,* outweigh the reasons for prior recourse to a neutral magistrate (citation omitted; emphasis added)." Id., at 759. Ever since the release of the decision and opinion in *Sanders,* the respondent has sought to place his case within its parameters. In fact, the respondent would argue that *Sanders* is a cloak for the suppression of any evidence found in the course of a warrantless search of receptacles located in an automobile. In doing so, he ignores the long-standing justification for certain warrantless searches found in the doctrine of search incident to a lawful arrest, to which this Court referred in the above quotation. It will thus become clear, in the analysis below, that

Sanders is in reality clearly and easily distinguished from the case at bar.

"(A)n apparently small difference in the factual situation frequently is viewed as a controlling difference in determining Fourth Amendment rights." Id., at 757. This is true in the instant case as well; certainly the facts and circumstances involved in this matter are the key to the determination of the issue presented.

In *Sanders*, members of the Little Rock, Arkansas Police Department, acting on an informant's tip, placed an airport under surveillance for an individual who was to be carrying a green suitcase containing marijuana. The police observed the defendant pick up the suitcase from the baggage area, meet another man there, hail a taxicab, place the suitcase into its trunk, and depart in the taxi. The cab was stopped several blocks away by two police officers who had followed the defendant from the airport, with the assistance of another patrol car. The police then asked the cab driver to open the trunk. This having been done, the police opened the suitcase on the spot, and the marijuana contained in it was discovered.

This Court held the search, having been conducted without a warrant, to be invalid. In so holding, the Court expressly refused to extend the "automobile exception" to the warrant requirement, first postulated in *Carroll v. United States*, 267 U.S. 132 (1925) and expounded upon in *Chambers v. Maroney*, 399 U.S. 42 (1970), to allow warrantless searches of personal luggage located in an automobile, absent the existence of exigent circumstances. "(A) suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations." *Arkansas v. Sanders, supra*, at 764.

This Court expressly did *not* consider, however, in either the majority or dissenting opinions, the question of whether the search could have been upheld as one incident to a lawful arrest.

> "(W)e (do not) consider the constitutionality of searches of luggage incident to the arrest of its possessor . . . The State has not argued that respondent's suitcase was searched incident to his arrest, and it appears that the bag was not within his 'immediate control' at the time of the search." Id., at 763, 764 (fn.11). "Since respondent was not formally arrested until after the suitcase was searched, the State does not argue that the suitcase was examined as part of a search incident to a custodial arrest." Id., at 769 (fn. 1; Blackmun, J., dissenting).

Beyond these clear statements themselves, other passages from the opinion make it abundantly obvious that *Sanders* is simply not a case invoking the search incident to arrest doctrine. For example, there is no question but that the luggage seized by the police was in their exclusive control at the time of the search. "(T)he officers had seized the luggage and had it exclusively within their control at the time of the search. Consequently, '*there was not the slightest danger* that (the luggage) or its contents could have been removed before a valid search warrant could be obtained.' " Id., at 762 (emphasis added).

Furthermore, this Court concluded its opinion by stating that "(W)here — as in the present case — the police, *without endangering themselves or risking loss of the evidence,* lawfully have detained one suspected of criminal activity *and secured his suitcase,* they should delay the search thereof until after judicial approval has been obtained." Id., at 766 (emphasis added). All of the foregoing simply demonstrates that, while the government did not argue that the search in *Sanders* was conducted incident to an arrest, the facts would probably not have sustained the search on that theory even if the government has pressed that argument, as the suitcase involved had been reduced to exclusive police control prior to its search.

This is not to say, however, that a search that is properly conducted as incident to arrest may not extend to a suitcase, such as that searched in *Sanders,* or other receptacles deserving of an ex-

pectation of privacy. On the contrary, the language cited above makes it quite clear that where the concerns justifying a search incident to arrest (i.e., personal safety and preservation of evidence) cannot be allayed prior to obtaining a warrant, then a search of such effects is entirely proper and reasonable. In noting that "special exigencies" may justify the warrantless search of a suitcase, this Court observed that such exigencies generally will depend "upon the probable contents of the luggage *and the suspect's access to those contents*, not upon whether the luggage is taken from an automobile." Id., at 763, 764 (fn.11; emphasis added). This language is then followed by the remark that the State in *Sanders* conceded that there were no exigencies in that case. The same certainly cannot be said of the instant case. We submit that the record clearly demonstrates the existence of exigent circumstances at the time of the search at bar, in that the search was of an area ready to hand of the arrestees.

A brief contrasting of the facts existing in this case with those present in *Sanders* underscores our point. In *Sanders*, there were at least three police officers and the taxicab driver present with the two defendants, unlike the four-on-one confrontation with which Trooper Nicot was faced in the present matter. Furthermore, while the defendants in *Sanders* apparently were neutralized by the greater number of police the four arrestees at bar were neither handcuffed nor secured in any other fasion. The police in *Sanders* knew in advance, on a tip from a reliable informant, that the particular suitcase involved contained contraband. Beyond that, the suitcase was locked in the taxicab's trunk, to which presumably only the cab driver had the key. In the instant case, Trooper Nicot had no knowledge of what was present in any area of the stopped automobile. In addition, the car was unlocked with the jackets in question lying in the center of the back seat. (Although it is not clear from the record, it seems quite likely that the vehicle's doors were open at the time). Finally, unlike *Sanders*, the four defendants in the instant matter had unequivocally been placed under arrest prior to the

search. In short, the circumstances surrounding the search in the instant case which justify it as incident to arrest simply did not correspondingly exist at the time of the search invalidated in *Sanders*.

From all of the foregoing it is clear that, notwithstanding the result in *Arkansas v. Sanders*, a search of luggage or other personal effects carrying an expectation of privacy may legally and constitutionally be conducted if incidental to a lawful arrest and the article has not been reduced to the exclusive control of the officer. Thus, all of the respondent's exhortations in the instant case, that the search of his jacket was unconstitutional because his expectation of privacy in it required a warrant, are misplaced as the jacket had not been removed from the ambit of potential access by the respondent or his fellow passengers.[7]

The same conclusion, that a warrantless search of an article (even one otherwise deserving of an expectation of privacy significant enough to compel a warrant under normal circumstances) will be sustained upon a showing of necessity therefor or exigent circumstances, can be drawn from this Court's opinion in *United States v. Chadwick*, 433 U.S. 1 (1977). As was there noted, *"(W)ith the footlocker safely immobilized*, it was unreasonable to

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[7]In any event, the respondent's claims relating to his purported right to privacy in the jacket are misplaced for another reason as well. While "the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them," *Arkansas v. Sanders, supra*, at 764, a jacket carries no similar purpose. As this Court has noted, "not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment." *Id.*, at 764, 765 (fn. 13). Obviously, a jacket is essentially utilized to shield one from the elements. Any use of it as storage for personal items must be regarded as merely incidental to its main function. Thus, while a particular item searched "may be used as a repository of personal effects, the mere possibility of such use does not lead to the conclusion that such containers are *inevitably* associated with an expectation of privacy for purposes of determining whether a warrantless search thereof violates the Fourth Amendment." *United States v. Goshern*, 628 F.2d 697 (1st Cir., 1980).

undertake the additional and greater intrusion of a search without a warrant." Id., at 13 (emphasis added). *"There being no exigency,* it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides." Id., at 11 (emphasis added).

Clearly, again, the issue of the reduction of the searched property to exclusive police control at the time of the search is the key to the determination of the validity of the search. We submit that, for all of the reasons discussed in this brief demonstrating why the subject jacket was not in the exclusive control of Trooper Nicot at the time he searched it, the search was thus lawful as incident to the respondent's arrest. The search was properly undertaken to insure the personal safety of the Trooper and the preservation of any readily destructible evidence. That being the case, the rule of *Arkansas v. Sanders,* relied upon by the respondent, is simply not relevant to this case.

CONCLUSION

The judgment of the New York Court of Appeals granting the respondent's motion to suppress and dismissing the indictment (J.A. 75) should be reversed.

Respectfully submitted,

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March 4, 1981